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Supreme Court, U.S.
FILED

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No._____

In The
Supreme Court of the United States

Terry Sanders,
Petitioner

v.

The May Department Stores Company,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Terry A. Sanders
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88 pp

Questions Presented for Review:

The questions pertain to the Family Medical Leave Act of 1993 (FMLA).

The below question is based on an opinion by the Seventh U.S. Circuit Court of Appeal.

1. Is there *strict* liability for the employer to follow the rules and regulations of FMLA, or provide FMLA protected leave, upon the following three criteria being met?
   a) The employee is an eligible employee under FMLA rules and regulations.
   b) The employee has a "serious health condition" under FMLA rules and regulations.
   c) The employee provides timely notification to their employer of the possible need for FMLA leave such that the employer *admits* recognizing the FMLA implication.

2. Assuming an employee is qualified for FMLA, if an offer of resignation is unaccepted by the employer, is the employee still entitled to the full rights of FMLA? Is the employee entitled to FMLA until the employment relationship is terminated?

Ms. Sanders was provided a 13-week Corporate Personal Leave of Absence that ran concurrent with her hospitalization and surgery. We contend that the leave should have been FMLA protected leave. The following question relates to this issue.

3. Assuming:
   a) The employee meets all the qualifications for FMLA, including notification to the employer.
   b) The employee was never advised of their rights to FMLA in writing.
   c) The employee was never asked for medical documentation, either orally or in writing.

d) The employee is placed on a 13 week Corporate Personal Leave (as opposed to FMLA leave). Does the Corporate Personal Leave have to meet the minimum standard of FMLA?

4. Can FMLA be waived, substituted, or declined?
   (We contend that the FMLA cannot be waived just as the minimum wage cannot be waived. Federal laws that establish a "minimum standard" in regard to wage or job security cannot be waived.)
   Follow-up Question: If FMLA can be waived should the party seeking to rely on a waiver have the burden to prove the waiver's validity?
   (The party seeking to enforce the waiver of a federal civil right has the burden to prove that the waiver was knowing and voluntary.)

The FMLA regulations specifically state employer FMLA notification to the employee must be in writing. (As opposed to oral advisement of FMLA.) The questions below relate to the written notification requirements.

5. Upon the employer recognizing that FMLA leave may be applicable to an employee situation, should the employer provide to the employee notification of their FMLA rights *promptly in writing*? Should an employer request for medical certification be provided *in writing?* Should the employer advise the employee *in writing* of the consequences for failure to comply with any legitimate FMLA requests?

The Eighth U.S. Court of Appeals opinion used the recent FMLA decision of the U.S. Supreme Court in the case of *Ragsdale v Wolverine World Wide, Inc.* 535 U.S. 81(2002) to claim that Sanders was not prejudiced by lack of proper FMLA notification because she would not have taken FMLA anyway. We believe this opinion misuses the U.S. Supreme Court decision to dismiss key FMLA rules and regulations.

6. What should the criteria be to claim a party was "not prejudiced" by an error at trial? Does the correcting of a serious trial error take precedent over the presumption that all facts at trial must be decided in favor of the prevailing party at the lower court level?

Ms. Sanders was rehired 6 ½ months after Ms. Sanders started litigation. If this Court reverses the judgment on any Count, then the question of whether Ms. Sanders' 1999 rehire position was "equivalent" becomes relevant to damages. Ms. Sanders was terminated 2 ½ months after her rehire. May Company's witnesses stated that Ms. Sanders was rehired under probation in justification of the early termination.

7. Under FMLA leave is coming back to a probationary position an "equivalent" position, assuming the employee was not on probation prior to the leave commencement?

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Opinions: The 1/9/2003 Opinion of the U.S. Eighth Circuit Court of Appeal appears as Appendix A. There were no other opinions in this case.

Jurisdiction: The date on which the United States Eighth Circuit Court of Appeals decided this case (case # 01-3344) was January 9, 2003.

A timely petition for rehearing was denied by the United States Eighth Circuit of Appeals on February 12, 2003. This is provided as Appendix B. The Federal Court order denying judgment notwithstanding the verdict appears at Ap. C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statutory Provisions Involved: This case arises under the Family and Medical Leave Act ("FMLA"), codified at 29 U.S.C. §2601, et seq. The applicable Statutes and Regulations are provided in Appendix D.

Case Background: Ms. Sanders was a 13 year very satisfactory employee with the May Department Stores Company when she went to the Manager of the Employee Relations Department, Ron Antoniewicz, on 3/16/98. She presented a letter describing her upcoming major surgery that required a nine-day hospital stay and two weeks of convalescing. (See Appendix E, Facts, #15). Sanders spoke of resignation in the letter but desired severance pay if she were to resign. (Ap. E, #16). As justification for severance pay she explained that she would be saving the company "sick pay" if she resigned. Antoniewicz said that there *would be no severance pay.* Sanders realized that with no severance available there was "no advantage" to resignation. Sanders inquired as to other options. Antoniewicz said he could try to get Sanders a leave of absence (unpaid). Sanders asked Antoniewicz to pursue getting her a leave of absence as that would provide her a "safety net" in case she needed to return. (Note the emphasis on the word "asked". May Company claims that Sanders never did ask for a leave.

When the prospect of a leave came up, Sanders did ask for the leave.) Antoniewicz did get Sanders a leave of absence, unpaid, which Sanders accepted. Sanders started leave on 4/24/98 (Ap. E, #20). Antoniewicz testified the leave of absence was 13-weeks from the beginning, however, he could not swear that he actually made that clear to Sanders. (Ap. E, #36). Sanders checked into the hospital on 6/3/98 and had surgery on 6/4/98. Sanders was discharged from the hospital on 6/11/98 (Ap. E, #24).

Sanders first letter inquiring about returning to work was May 16, less than 30 days into her leave and before surgery (see Ap. E, May 16 letter, #67). In her May 16 letter she spoke again of her upcoming surgery and advised May Company again of a "10 day hospital stay" and a required convalescing period (Ap. E, #68).

Sanders next letter, dated June 17, set an absolute date she wanted to return to work. That date was 6/29/98. (Ap. E, #69). Of legal significance, medical documentation was provided with this letter (Ap. E, #70; see also Ap. F).

Sander's letters of June 23, June 28, and July 10 reiterated Sanders desire to return to work. (Ap. E, #71-#76). Despite Sanders request to return to work May Company refused to return Sanders to any position. May Company claimed that Sanders waived FMLA or chose Personal Leave in lieu of FMLA leave (Ap. E, #17-#19, #23). Under May's Personal Leave, May Company reserved the right to accept the employee back or not. Sanders was terminated on 7/31/98 after her 13-week Personal Leave ended (Ap. E, #26).

Here is where the facts surrounding the leave differ.[1] (Regardless of the disputed facts of this case Sanders should have prevailed as a matter of law.) Sanders testimony was that she decisively accepted the only leave offered, which May Company calls Personal Leave. Antoniewicz claims he immediately recognized the FMLA implication and offered Sanders FMLA, which Sanders immediately rejected.

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[1] As May Company prevailed at trial we assumed in our Appeal, and in this petition, that all questions of "fact" are presented in May's favor.

Sanders did not know that FMLA applied to her surgery so she could not specifically ask for "FMLA" by name.[2] The Appeal Court missed the *setting* logic in their opinion when Judge Smith writes, "Thus, it is plain from these facts that Sanders did not actually attempt to pursue FMLA leave."[3]

Our argument is that once May Company recognized that FMLA applied to Sanders situation they were obliged to follow the rules and regulations of FMLA. Key among those rules and regulations is that the employee is to be provided an explanation of FMLA *in writing*. Had Sanders been provided with a proper *written* explanation of FMLA, thereby provided knowledge of FMLA, she would have chosen the better, secure FMLA leave. It is obvious that one cannot *ask for* something they are *not* aware of.

All parties agree that no explanation of FMLA was provided *in writing*. All parties agree that no medical documentation was asked for either orally or *in writing*, although Antoniewicz claims medical documentation was mentioned. There was no written documentation pertaining to medical leave or FMLA leave at any time during the period encompassing these events (3/16/98 (first meeting) to 7/31/98, (termination)). Neither was there any written documentation pertaining to May Company's 13-week Personal Leave during this 4-½ month time period.

It should be made clear that Sanders is not asking this court to consider the disputed facts of this case. The primary question before this court is the extent to which the lower courts must give effect to the detailed FMLA regulations

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[2] Sanders would not find out that FMLA covered sex reassignment surgery until after she was terminated when she started calling attorneys, after 7/31/98 (see Ap E, #55, #72, ref. lack of understanding). Upon finding out that her surgery could have been covered under FMLA Sanders wrote May Company on August 12 a letter demanding her job back and all the past benefits that should have been afforded her (Ap. E, #77).

[3] Sanders Appeal Court Brief presented Sander's testimony that she was *not* told of FMLA and she did *not* know FMLA applied to her surgery (Ap. E, #55, #58, #61). Sanders lost at trial and we *had to assume* in the Appeal brief that May Company told her of FMLA and she declined FMLA.

promulgated by the Department of Labor[4] and the extent to which the lower courts must adhere to past U.S. Court of Appeals decisions regarding the FMLA. The current opinion in this case either ignores or conflicts with the DOL regulations and past court rulings regarding FMLA.

Statement of the Case: On March 9, 2000 Terry Sanders filed a three-count petition against The May Department Stores Company (hereinafter "May Company"), her former employer, alleging violations of the Family and Medical Leave Act of 1993 ("FMLA"). Count I alleged Denial of FMLA rights by failure to restore Sanders to her pre-FMLA job, or to an equivalent job. Count II alleged interference with FMLA rights by failing to advise Sanders of her FMLA rights, causing her to waive her FMLA rights and lose her job. Count III alleged retaliation during a period of re-employment for complaining of the alleged FMLA violations.

A jury trial commenced on June 18, 2001 in the U.S. District Court for the Eastern District of Missouri. Judge Stohr denied both parties' motions for judgment. The jury returned a verdict for May Company on all three counts on June 21, 2001. On July 10, 2001, Sanders filed a Motion for Judgment Notwithstanding the Verdict, Or in The Alternative For A New Trial. On August 15, 2001, Judge Stohr denied the Motion.

Regarding Count I (denial of FMLA rights): The trial judge abused his discretion when he denied Sanders' motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The trial judge abused his discretion in declining to issue key jury instructions on the issues of Waiver of FMLA Rights and the legal effect of an unaccepted resignation. The jury verdict was against the great weight of the evidence, because the undisputed facts show that Sanders was eligible for FMLA leave, gave Notice

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[4] Key among those regulations is that FMLA notification by the employer to the employee must be in writing. Had that simple regulation been followed all the other violations of FMLA would have been avoided.

as a matter of law, had a qualifying serious health condition, and did not receive FMLA-protected leave. FMLA provides for strict employer liability for such denial of leave.

Regarding Count II (Interference with FMLA rights by obtaining an illegal waiver of FMLA rights from Ms. Sanders): The trial judge committed reversible error in refusing to correct a materially flawed jury instruction on the critical Employer Notice of Rights issue, and otherwise abused his discretion in refusing to issue key jury instructions on the issues of Waiver of FMLA Rights and the legal effect of an unaccepted resignation. The trial judge abused his discretion in denying Sanders' motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The judge abused his discretion in denying Sanders judgment as a matter of law on the issues related to the Waiver of FMLA rights, prejudicing the jury against Sanders. If the judge had issued the requested rulings as a matter of law, and issued the requested jury instructions on key issues, the jury verdict on Count II would then be against the great weight of the evidence based on the undisputed facts.

On appeal the U.S. Eighth Circuit Court of Appeals refused to give effect to several Department of Labor FMLA Regulations. The opinion of the Eighth Circuit was in contradiction with past opinions by the Seventh Circuit of Appeal and its own past opinions. The court incorrectly ruled on the legal effect of an unaccepted resignation. This denied Sanders her right to FMLA.

The Eighth Circuit Court of Appeal refused to provide a new trial on the issue of the flawed jury instructions justifying its position by saying Sanders "was not prejudiced" by the error at trial because she would not have accepted FMLA leave anyway. The U.S. Court of Appeal based their decision on the recent U.S. Supreme Court FMLA decision in the case of *Ragsdale v Wolverine Worldwide*. We believe this is a misuse of the U.S. Supreme Court decision. It sets a terrible precedent if this decision is allowed to stand.

Ms. Sanders filed for a motion for rehearing, which was denied. Ms. Sanders appeals to the United States Supreme

Court pleading with this court to give effect to the FMLA Rules and Regulations and past court rulings.

Reasons for Granting the Writ

Review of Question 1: The employer should be held to strict liability to provide FMLA.

FMLA sets a minimum labor standard, similar to other laws such as the child labor laws, the minimum wage laws, the safety and health laws, the pension and welfare laws and other labor laws that establish minimum standards for employment. *Ragsdale v. Wolverine Worldwide*, 218 F.3d 933, 939 (8th Cir 2000), *cert. granted*, 121 S.Ct. 2548 (2001). The Eighth Circuit has referred to FMLA as creating "substantive entitlements." *See Rankin v. Seagate*, 246 F.3d 1145, 1148 (8th cir. 2001)("Without belaboring the point, we agree with our sister circuit's conclusion that 'applying rules designed for anti-discrimination laws to statutes creating substantive entitlements is apt to confuse.")

FMLA was enacted in 1993 by the United States Congress and gives eligible employees the right to take up to twelve weeks of medical leave for any "serious health condition" of the employee. 29 U.S.C. §2612(a). FMLA requires the employer to restore the employee to her pre-FMLA job, or give an equivalent job, at the conclusion of the leave. 29 U.S.C. §2614(a). Damages consist primarily of lost pay and benefits, doubled as liquidated damages unless the employer's violation is deemed by the court to be in "good faith", plus equitable relief. 29 U.S.C. §2617(a)(1).

The employee has a cause of action under FMLA if the employer interferes with, restrains or denies her attempt to exercise her FMLA rights. Sanders sued over two alleged violations of this section, the denial of FMLA rights (Count I) and interference with FMLA rights (Count II).

FMLA states, under 29 U.S.C. § 2615, " Prohibited acts": (a) Interference with rights. (1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title. 29 U.S.C. § 2615.

Employer liability is strict for denial of FMLA rights when an employee demonstrates eligibility for the leave at issue; intent to violate FMLA is not required. Count I of Sanders' case is a denial of rights claim subject to strict employer liability.

> "When an employee alleges a deprivation of FMLA's substantive guarantees [of leave and job restoration], the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. In such cases, the intent of the employer is immaterial." *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999) (noting that a FMLA retaliation claim, by contrast, involves intent).
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> *Cross v. Southwest Rec. Indus.*, 17 F. Supp. 2d 1362, 1368-69 (N.D. Ga. 1998) ("The FMLA thus imposes strict liability upon employers who deny a FMLA entitlement to a qualified employee . . . Indeed, in order to succeed on a claim than an employer denied a FMLA benefit under §§ 2615(a)(1), a plaintiff simply must prove that she was entitled to the benefit under the statute and the employer denied the benefit").

The court in *Cross* collected authorities and reviewed the rules of statutory construction in concluding that FMLA provides for strict employer liability. For one example, the *Cross* court noted that under the rules of statutory construction, the presence of the word "shall" in a key FMLA provision (29 U.S.C. 2615(a)(1)) means "mandatory"; for this and other reasons FMLA liability is strict for failure to provide the FMLA entitlements. *See Id.*

To demonstrate entitlement to leave and invoke strict FMLA liability for denial of the leave, an employee needs to prove that she was an eligible employee, and that she gave notice of the need for leave for her own serious health condition.

Ms. Sanders made that proof with undisputed facts, and the trial court and appeal court in error denied judgment and instructions to Sanders, and the jury verdict was against the clear weight of the evidence.

Employee's Notice - Adequacy of Notice: An employee has given notice of the need for FMLA leave when the employee has provided enough information to the employer so that the employer can see that the employee may be in need of FMLA leave. Sanders gave adequate Notice as a matter of law, because May Company acknowledged perceiving that she may be entitled to FMLA (Ap. E #17-#19, #23). The lower courts committed prejudicial error in denying Sanders judgment and instructions on the adequacy of Sanders' notice of the need for leave, and the verdict was against the great weight of the evidence on the Notice issue.

> "Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." *Spangler v. Federal Home Loan Bank of Des Moines*, Slip Op. 01-2476, at p8 (8th Cir. January 30, 2002).
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> *Spangler v. Federal Home Loan Bank of Des Moines*, Slip Op. 01-2476, at p10-p11 (8th Cir. January 30, 2002); "When an employee provides the employer with notice that she may be in need of FMLA leave before the fact of the absence, it then becomes the employer's duty to determine whether or not the employee actually requires FMLA leave if there is some doubt as to whether or not the request would qualify. Once the employer is notified, it has a duty either to provide FMLA time or follow the procedures set forth in the statute and regulations to verify the validity of the employee's request for time off "by certification issued by the health care provider" citing, 29 U.S.C. 2613(a); *Thorson*, 205 F.3d at 381. "The responsibility to request FMLA certification is the employer's". "[A]n employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work." *Id.* (citing *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381, 382 (8th Cir. 2000)).

In *Spangler*, the employee missed work periodically by calling in sick or being tardy, and then was terminated for

excessive absenteeism. *See Spangler*, Slip Op. 01-2476, at pp 2-4. The employee sued, arguing that the employer should have treated her absences as FMLA-protected, but the district court granted summary judgment to the employer concluding that the employee did not give notice of the need for FMLA leave. *Id.* at p 7. The Eighth Circuit reversed, because the employer's managers knew about the employee's history of treatment and leave for depression, and on her last day she had orally stated that depression was again causing her to call in sick. *Id.* at pp 7-8 (ruling that the employee had given the employer enough information to determine that she may be in need of FMLA leave).

In *Thorson*, the employee was terminated for exceeding the employer's absence policy. *See Thorson v.Gemini, Inc*, 205 F.3d 370, 374 (8th Cir. 2000), *cert. denied*, 531 U.S. 871 (2000) ("[Thorson] was terminated on February 18 for absenteeism exceeding five percent of her scheduled work hours during the previous twelve months."). Thorson had a doctor's note for her absences. *Id.* The trial court awarded summary judgment to the employee, which the Eighth Circuit affirmed. *Id.*

The Eighth Circuit determined that upon the employer learning that Thorson was absent with doctor's notes, the employer became obligated to either treat the leave as FMLA or else invoke FMLA's certification or second medical examination provisions to resist the leave. The court stated:

> "An employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work. See id. §§ 825.302(c) (1993). "Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." [. . .] *Thorson*, 205 F.3d at 381.

We note in passing that the employee's Notice must be timely, preferably 30 days for planned medical treatment. Here, Sanders gave Notice in mid-March 1998 of a hospitalization scheduled for June 3, 1998, clearly more than

thirty days in advance (29 U.S.C. §§ 2612(e)(1)).

The law and the cases make it plain that when an employee presents sufficient information to the employer about planned medical treatment to cause the *employer to perceive* that the employee may be in need of FMLA leave, the employer has been adequately "noticed" under FMLA.

In Sanders' case, May Company's witnesses *admitted* they contemporaneously perceived that FMLA may apply to Sanders' anticipated June 1998 hospitalization after reading the March 11, 1998 letter. Moreover, Manager Antoniewicz testified that he actually discussed FMLA with Sanders and told Sanders that she was *entitled* to FMLA. Therefore, under FMLA, and May Company, has acknowledged that it received "notice" that Sanders may be in need of FMLA leave.

In the absence of a genuine factual dispute on the issue of Notice, then the trial court should have granted Sander's summary judgment, or a directed verdict or else JNOV. Based on the preceding, if the Court accepts Ms. Sanders' view of the law regarding the employee's Notice of the need for leave, then reversal of the judgment on Count I is proper. As a matter of law and undisputed facts Sanders met the FMLA criteria for a protected leave, but did not receive FMLA-protected leave.

Review of Question 2: An unaccepted resignation does not affect one's right to FMLA; it is a legal nullity. The employee is entitled to FMLA until the employment relationship is terminated.

Prejudicial error occurred regarding issues of "resignation" and "waiver" or "refusal" of FMLA rights. Based on the undisputed facts and the law, Sanders did not resign and did not "waive" or "refuse" FMLA. Sanders was uncertain about her eventual return to work in March and early into her leave, however, that does *not* disqualify her from FMLA. FMLA acknowledges that there will be some people who will not return from FMLA leave when it speaks of how employers may recover insurance premiums. See 29 C.F.R. §825.213(a). It was prejudicial error for the judge to

refuse instructions to clarify these issues for the jury.

The judge unreasonably declined to instruct the jury to clarify the law regarding issues of resignation and waiver of FMLA rights. He in effect allowed the jury to decide whether Sanders' unaccepted resignation would cancel her FMLA rights, and whether Sanders really could orally waive or refuse FMLA leave. This was an error of law and an abuse of discretion, resulting in prejudice to Ms. Sanders.

We show below that an unaccepted resignation should be treated as legally insignificant, a nullity, on these facts. The *Pritchard* case indicates strongly that an unaccepted resignation is a legal nullity on the facts of our case. *See Pritchard v. The Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997).

The *Pritchard* case is instructive because in this employment case the plaintiff tendered her resignation, which was not accepted, and the fact of the tendered resignation did not in any way adversely affect her rights. In *Pritchard*, the employee tendered her resignation but her supervisor did not accept it, and instead placed her on a disability leave, first paid then unpaid. *Id.* at 1131-1132. The plaintiff then needed a job reassignment to match her limitations, which the employer could not accommodate, so she was eventually terminated, and she sued for disability discrimination. *Id.* The trial court granted summary judgment to the employer, ruling no genuine issue of fact existed regarding her having a disability. *See Id.* at 1134. On appeal, the court reversed, finding that when the employer refused to accept the resignation and instead placed the employee on disability leave, the employee could use the fact of the disability leave as evidence that the employer regarded her as having a disability. *See Id.*

In our case, as in *Pritchard*, the unaccepted resignation did nothing to affect the requirements of the applicable law. Upon Sanders unaccepted resignation she was still an employee who had worked a sufficient number of hours over the past twelve months to be eligible to take a FMLA leave; and, Sanders' letter of March 11, 1998 still Noticed a planned

nine-day hospitalization for surgery, which was FMLA-eligible. Hence, the unaccepted resignation changed nothing with regard to Sanders FMLA rights or May Company's obligations, just as the unaccepted resignation by the *Pritchard* plaintiff did not release the employer from its disability law obligations.

This case so much centers on the effect of an unaccepted resignation. May Company could have had Sander's resignation if they would have provided Sanders severance pay, as she requested. May Company said no to severance pay and that "opened the door" to the Sanders seeking other options. A leave of absence was offered by May Company and accepted by Sanders.

Despite the leave provided, Judge Smith of the Eighth Circuit Court of Appeal justifies his opinion by alleging that Sanders resigned. He bases this on a letter Sanders wrote to one of her doctors wherein Sanders stated that <u>after</u> her leave of absence she would be resigning.[5] But this letter was <u>not</u> provided to her employer. The FMLA specifically requires unequivocal notice <u>to the employer</u> of the intent not to return. (29 CFR 825.312(e). What Sanders "thoughts" were prior to the commencement of her leave or what third parties Sanders told her thoughts to "don't count". Sanders was smart enough "not to trash" the leave she had been granted by telling her employer she would not be returning.

The letter Judge Smith refers to is legally insignificant because it was *not provided to her employer.* May Company would not find out about the letter until *two years later,* during litigation discovery. Further, it should be pointed out that Antoniewicz knew Sanders was contemplating resigning, ***still*** a leave of absence was provided so as Sanders could consider everything before she resigned.

May Company would like to claim Sanders resigned to prevail in this lawsuit, but the facts are overwhelming that

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[5] Sanders explained at trial that she would have resigned *had her plans worked out.* If not, she still had her leave of absence to fall back on. It is ok to take FMLA leave even if one is not certain about their eventual return.

Ms. Sanders did not resign. (See Appendix E, "Facts on the Issue of Ms. Sanders Alleged Resignation", #41-#47). Every internal document May Company generated in regard to Sanders final termination supports a termination date of July 31, the date her 13-week Personal Leave expired. Two Service letters provided Sanders, which under penalty of law May Company must be truthful, support a termination date of July 31. May Company's own witnesses at trial said Sanders was presented with a leave of absence and did not resign.

A provided leave of absence should be accepted at its common meaning. If May Company meant "leave of absence" to mean, "you really resigned and it is at our discretion to return you or not" than May Company *should have explained such.* There was no explanation of May's 13-week Personal Leave despite Sanders having requested an explanation twice. (See Appendix E, Facts, #57, #64-#66).

The legal effect of an unaccepted resignation needs to be addressed by this court. The Appeal Court was wrong in declaring a Leave of Absence the same as resignation. When an employer is allowed to claim a provided leave of absence is resignation the employee is deceived and FMLA entitlement rights are lost.

That under Personal Leave the right to FMLA continues is further supported by regulation 29 C.F.R. §825.207(e)(h):

> "(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off" may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes."

Section (h) of §825.207 goes on to say that if the employer elects to substitute personal leave for FMLA leave that an employee may be required to comply with any medical certification requirement. However, May Company never

did ask Sanders for medical certification.[6]

The lower courts are not giving effect to the FMLA code that entitles an employee to FMLA until such time as the employment relationship is terminated, 29 CFR §825.312 (e):

> "(e) .....If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases.....". (Underscore added.)

Clearly Sanders employment relationship was not terminated because she was placed on a Personal Leave of absence. Further, her health insurance, employee in-store discount, and other benefits continued right up to her termination date of July 31, 1998. (Would May Company continue to provide benefits to a *non-employee*?) As the employment relationship was not ended until July 31, 1998, she was entitled to FMLA leave up to July 31, 1998. In fact, Sanders required only eight weeks of leave and specifically requested in writing a return date of June 29. (See Appendix E, #69 from letter of June 17, 1998.) What we are saying is this: Sanders leave could have indeed started out as "Personal Leave", however, she still had the right to FMLA leave right up to her termination, July 31. The taking of Personal Leave early, *should not disqualify her from FMLA leave later.* Never did May Company advise Sanders that if she took Personal Leave she would loose all rights to FMLA. Indeed, that would not have been legal under FMLA! (See also, Review of Question 5, *Ragsdale* case.)

Review of Question 3: Corporate Personal Leave has to meet the minimum standard of FMLA leave.

May Company knew of Sanders desire to return to work. Sanders wrote to May Company on May 16 saying she was considering returning to work. In a June 17 letter she was

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[6] Employer request for medical certification must be in writing. (See 29 C.F.R. §825.301(2)(i), §825.301(b)-(c); see also §825.315(d).

absolute about her desire to return to work and she even set a date for that return, June 29, 1998. (See Ap. E, Facts, #65-#76 from letters of May, June and July). All during this time Sanders was on May's Personal Leave. Desiring to return to work is tantamount to "requesting leave". May Company knew of Sander's major surgery, knew of her desire to return to work, knew she qualified for FMLA, yet failed to provide FMLA protected leave or follow any of the rules and regulations of FMLA. Further, May Company never requested medical documentation but May Company was provided medical documentation with Sander's June 17 letter (reference, Ap. E, #70, shown as Ap. F).[7] This act further *reinforced Sander's absolute right to FMLA*. The DOL FMLA regulations very strongly suggest that FMLA can only be delayed until such time as medical documentation is provided. FMLA cannot be denied. See 29 C.F.R. §825.311(a), §825.312(a)(b), shown in Appendix D. The conclusion of all this is: *May Company knew Sanders met every qualification for FMLA protected leave.*

The recent FMLA U.S. Supreme Court decision in *Ragsdale v Wolverine Worldwide, 535 U.S. 81(2002), p13,* supports a "minimum standard" of leave when the employee is *qualified for FMLA* protected leave. Judge Kennedy's opinion speaks of Congress's intent to establish a "minimum level" of job security through the FMLA when he writes:

> "The FMLA was intended to pull certain employers up to the minimum standard, ..."

As May's Personal Leave *ran concurrent* with Sander's qualification for FMLA leave May's Personal Leave had to provide *at minimum* the protections of FMLA. Sanders Personal Leave should have been considered the equivalent

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[7] The documentation was inadvertently provided. Sanders wanted Antoniewicz to know that she would be *returning as female*, her sex reassignment surgery having been completed. This would avoid the "which restroom" issue with co-workers. The Medical Documentation consisted of a notarized letter from her doctor describing the surgery she had undergone (shown as Appendix F).

of FMLA the day she entered the hospital, June 3.

Review of Question 4: The wavier , substitute, or "opt out" of FMLA is not possible.

The law prohibits waiver of FMLA rights. Even if waiver were possible Sanders' waiver was not knowing and voluntary under the "Totality of the Circumstances test".

Employees may not "refuse" or waive or "opt out" of their FMLA entitlement, any more than they may waive or refuse other labor entitlements such as overtime pay and minimum wages. Even if such waiver is possible, then under the "Totality of the Circumstances Test" Ms. Sanders could not have made a knowing and voluntary oral waiver of her FMLA rights as a matter of law.

> "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA, or "trade off" their FMLA rights for some other benefit offered by the employer." 29 C.F.R. §825.220(d).

This C.F.R. provision, 29 C.F.R. §825.220(d), has been upheld by the court in *Bluitt v. Eval Company of America*, 3 F. Supp. 2d 761, 763 (S.D. Tx. 1998).

We see no persuasive reason that FMLA should be treated any differently than the Fair Labor Standards Act ("FLSA") with regard to the public policy generally prohibiting waiver of fundamental substantive guaranteed labor rights. The FLSA is codified at 29 U.S.C. Sec 201, *et seq.* The U.S.S.C. has stated that public policy generally precludes waiver of FLSA rights by contract or agreement, saying that this would nullify the purposes of the statute and thwart the legislative policies the FLSA was designed to effectuate. *See Barrentine v. Arkansas Best Freight Systems, Inc.*, 450 U.S. 728, 740-741 (1981). FMLA is part of the labor code, Title 29, as is the FLSA. Rights and protections of FMLA are automatic, just as the rights and protections of the FLSA's minimum wage and overtime requirements are automatic. As noted elsewhere in the brief, FMLA established an entitlement to a new minimum labor standard, just like the FLSA. The public policy regarding waiver or forfeiture of such labor

entitlements should be treated the same by the courts.

Even if such waiver is possible, then under the Totality of the Circumstances Test, Sanders could not have made a knowing and voluntary oral waiver of her federal FMLA rights as a matter of law. The party seeking to rely on a waiver has the burden to prove the waiver's validity.

When federal civil rights are being waived, courts should apply the Totality of the Circumstances test to determine if the waivers were knowing and voluntary. The reported cases regarding validity of waivers arise mostly in cases regarding waivers contained in settlement agreements, but should be instructive in our case. *See Generally Pierce v. Achison, Topeka and Santa Fe Railroad,* 65 F.3d 562, 571 (7th Cir. 1995), where the court expounds on the Totality of the Circumstances test for evaluation of whether a waiver of a federal civil right was knowing and voluntary:

Like the other circuits that currently employ the federal totality approach, a court should look to a number of factors to assess the validity of a particular release, including, but not limited to: 1) the employee's education and business experience; 2) the employee's input in negotiating the terms of the settlement; 3) the clarity of the agreement; 4) the amount of time the employee had for deliberation before signing the release; 5) whether the employee actually read the release and considered its terms before signing it; 6) whether the employee was represented by counsel or consulted with an attorney; 7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law; and 8) whether the employee's release was induced by improper conduct on the defendant's part. *Pierce,* 65 F.3d at 571.

In a second ruling, the *Pierce* court clarified that the party seeking to enforce the waiver of a federal civil right has the burden to prove that the waiver was knowing and voluntary. *Pierce v. Atchison,* 110 F.3d 431, 438 (7th Cir. 1997).

The facts of our case show that, under the Totality of the Circumstances test, Sanders' alleged oral and immediate waiver of FMLA rights was not knowing and voluntary. We

will look at the steps of the test one by one, and note whether each test is opposed to the waiver's validity or in favor of the waiver's validity. (#'s below relate to Appendix E)

(1) the employee's education and business experience. - This factor is opposed to the waiver. There was no evidence that Sanders had ever before used FMLA leave or attempted to use such leave, so she had no relevant business experience with the rights being waived.

(2) the employee's input. - This factor is opposed to the waiver. Sanders and Antoniewicz discussed Sanders' letter of March 11, 1998, but Sanders had not been contemporaneously advised in writing of her FMLA rights as required by law, so her "input" was not demonstrably educated on the relevant issues, #29. See factor 8 below.

(3) the clarity of the agreement. - This factor is opposed to the waiver. Antoniewicz never reduced the waiver or the terms of the personal leave to writing. The witnesses all conflicted regarding the duration of the personal leave. Antoniewicz thought the leave was 13 weeks; Sikyta thought the leave was 6 weeks; Sanders thought it was 30 days. Antoniewicz did not compare and contrast the terms of FMLA and personal leave, #29, #30, #36, #48.

(4) the amount of time the employee had for deliberation. - This factor is opposed to the waiver. Antoniewicz testified that at his first meeting with Sanders in March 1998 she was very emotional and very quickly declined FMLA, and that within a week or so he offered her a "personal leave" which she accepted, but he did not discuss FMLA with her at the time he offered her personal leave, #31, #32, #33, #49-#51.

(5) whether the employee actually read the release and considered its terms before signing it. - This factor is opposed to the waiver. May Company did not reduce the waiver to writing. Antoniewicz did not make any documentation whatsoever regarding the personal leave or Sanders' alleged refusal of FMLA leave. May Company did not follow the law and provide Sanders with timely written FMLA advice before obtaining the waiver, #29, #31, #57.

(6) whether the employee was represented by counsel or

consulted with an attorney. - This factor is opposed to the waiver. The record does not reflect an attorney for Sanders being involved in March 1998. Moreover, May Company's witnesses did not put forth any testimony or evidence to the effect that they advised Sanders to seek counsel from an attorney before waiving her FMLA rights.

(7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law. - This factor is opposed to the waiver. Antoniewicz admitted that the personal leave is inferior to FMLA leave, #40, #53. It was undisputed that FMLA provides job protection, but the personal leave does not. Moreover, Antoniewicz testified that the confidentiality protections of the personal leave are inferior to FMLA, #39.

(8) whether the employee's release was induced by improper conduct on the defendant's part. - This factor is opposed to the waiver. May Company engaged in improper conduct by failing to provide a prompt written notice to Sanders of her FMLA rights and obligations *after* Manager Antoniewicz realized that FMLA might apply. FMLA does not trust employers to *orally* advise employees of their FMLA rights. *See* 29 C.F.R. § 825.301(b)-(c). #28, #29.

In conclusion, based on the Totality of the Circumstances test, Sanders did not knowingly and voluntarily waive her FMLA rights as a matter of law.

May Company alleges that Sanders immediately turned down FMLA. Sanders testimony was that she accepted the only leave offered. While these "facts" are not at issue before this court this disputed testimony does serve to *make the point* on why the FMLA requires notification by the employer to the employee in writing. There was no documentation on the alleged offer of FMLA. Neither was there any documentation of May's Personal Leave. Sanders is offered a 13-week Personal Leave thinking she could return for the asking (see Ap. E, Facts, #56). Even if it were possible to waive, decline, or "op-out" of FMLA Sanders never did so with an understanding of *either leave*.

How can one be expected "to choose" a leave when

neither leave is explained? What difference would it make which leave she allegedly chose when Personal Leave is presented as "*as good as*" FMLA?

May Company argued in their U.S. Court of Appeal brief that Personal Leave was offered to secure vacation for Sanders.[8] When May Company presents that Personal Leave was offered to secure vacation the offer of vacation becomes an "inducement" in violation of the anti-waiver provision of FMLA. Section 29 C.F.R §825.220(d):

> "(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." (Underscore added.)

Just to be clear, we do understand that there are ways within the law that FMLA rights may be lost, for example, if medical documentation was *requested in writing* and Sanders refused to comply. However, an alleged oral decline of FMLA by Sanders based on an alleged oral advisement of FMLA by Antoniewicz is not legal when dealing with Federal Laws designed to protect the employee.

Review of Question 5: FMLA notification to the employee by the employer must be in writing.

The Employer's-Notice issue was central to Sanders' claim of Interference under Count II, cognizable under *Ragsdale*. FMLA requires that the employer *in writing* advise the employee of her FMLA rights and obligations *after* the employee has put the employer on notice that she may be in need of FMLA leave. The judge committed prejudicial error in refusing to properly instruct the jury on the law. The Court of Appeal did nothing to correct this error of law.

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[8] Sander's vested vacation was only four workdays away, May 1. If Sanders truly wanted to resign May Company could have provided vacation without the additional requirement of providing leave. In fact, Antoniewicz's 7/31/98 letter terminating Sanders said that it was *against* company policy to provide vacation with Personal Leave (see Appendix E, Facts, #26). Sanders requested leave when severance pay was denied and that is the real reason leave was provided.

The heart and soul of our case under Count II was that May Company failed in its legal obligation to provide Sanders with *timely written notice* of her FMLA rights and obligations, and that this caused her to fail to recognize that she could have FMLA protections, and that if she had known of her FMLA rights, she would have chosen FMLA. The written statement must include a list of any of the employer's requirements, such as the need to provide a medical certification. FMLA does not trust employers to *orally* advise employees of their FMLA rights. See 29 C.F.R. § 825.301.

We would not be in front of this Court or any other court if May Company had provided Sanders a *written statement* of Sanders' FMLA rights and obligations as required by law. Such written statement would have told Sanders of her rights under FMLA, and would have given Sanders a deadline to submit a medical certification. Then, if Sanders failed to submit the *required* certification, she would not be entitled to FMLA protections. It is undisputed that May Company did not provide a written notice of FMLA rights and obligations after Antoniewicz recognized the applicability of FMLA.

> "It is the employer's responsibility in all cases to provide a notice designating the leave as FMLA." 29 C.F.R. § 825.208 (a). 29 C.F.R. § 825.208 also states:
> (b)(1) "Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. § 825.208 (b)(1).

The employer has further written notice obligations to the employee, specifically the obligation to promptly inform the employee of her right to job restoration, and what will be expected of the employee, such as the requirement to provide a medical certification and advising the employee of the penalty for failure to cooperate. *See* 29 C.F.R. § 825.301(b)-(c).

The Eighth Circuit in *Ragsdale v. Wolverine*, 218 F.3d 933 (8th Cir. 2000), *cert. granted*, 121 S.Ct. 2548 (2001), recognized the possibility that an employer can interfere with

an employee's FMLA rights by failing to give proper notice of rights to the employee, causing the employee to lose FMLA protections, which is exactly what we contend happened in this case at bar. The court stated:

> "There are various situations in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights. For example, notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks.[. . .] Also, in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave."
> *Ragsdale*, 218 F.3d at 939-940.

In a ruling inapplicable to the case at bar, the court limited 29 C.F.R. §§ 825.208(c) to the extent that it purports to impose a penalty on employers by requiring more than the prescribed 12 weeks of leave if the employer failed to timely "designate" the leave as FMLA leave, but the court left the regulation otherwise intact. *Ragsdale*, 218 F.3d at 939-940.

We contend that Sanders' situation is a type of interference claim that is allowable under *Ragsdale*. Our case is not a case where we are seeking to impose a penalty of extra FMLA time for failure to designate the leave such as occurred in *Ragsdale*. Instead, our case involves the employer recognizing that FMLA may apply, then obtaining a *purported* oral waiver of FMLA rights in favor of an inferior "personal leave" without first following the regulations and giving Sanders a prompt written statement of her FMLA and obligations after learning that she may need FMLA leave.

Review of Question 6: The Eighth Circuit Court of Appeal has misused the U.S.S.C. FMLA decision in *Ragdale v Wolverine* to justify not recognizing a serious trial error.

The Eighth Circuit Court of Appeal has misused the recent U.S.S.C decision in the FMLA case of *Ragsdale v Wolverine Worldwide. Ragsdale v. Wolverine Worldwide*, 535 U.S. 81(2002; 29 C.F.R. §825.112(a); 29 C.F.R. §825.302(c). The court claims Sanders was not prejudiced in regard to a serious error at trial because she would not have chosen FMLA anyway. Judge Smith writes on page 6, 1st paragraph of his opinion:

> "This refusal (reference the alleged refusal of FMLA) was consistent with her articulated desire for non-disclosure of her gender reassignment."

This decision was not only wrong, but also, highly speculative. Courts should not deny one's right to a Federal Entitlement based on such speculative and controversial thinking by a judge. We will first address the speculative nature of the "not prejudiced" opinion of the Appeal Court.

May Company claims that Sanders had no desire for FMLA because she did not want to provide medical documentation. All this is speculation and does not wash with the logic of the situation. Consider: Sander's March 11 letter to Antoniewicz told all there was to tell about her gender dysphoria problem and the surgery required to correct her problem. Her letter included the phone numbers and addresses of her doctors. When Antoniewicz asked if he could show the letter to his superior her reply was, "yes". In addition, in the final paragraph of her March 11 letter Sanders acknowledges that other people will read and see her letter. She writes,

> "Ron, and to anyone else who reads this, I would like to provide you with this final thought: I did not ask to be the way I am.....". (Underscore added).

Never did Sanders ask for the return of the March 11 letter[9], May 16 letter, or June 17 letter. These letters all spoke

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9 Antoniewicz did return the March 11 letter, however, Sanders never asked for the return of that letter. Sanders did ask for the return of some photographs that accompanied the letter. Her May 16 letter was mailed to May Company. Sanders never asked for the return of that letter. The point

of her upcoming surgery. Sanders knew these letters would be placed in her personnel file. In her June 17 letter Sanders states that she no longer requests confidentiality even with her coworkers (see Ap. E, # 69.5). In short, Sanders was always *forthcoming and candid with the Employee Relations Department* (ER). Further, after her termination Sanders found out that FMLA demanded an even higher standard of confidentiality than Personal Leave. In conclusion, Sanders would have had no problem submitting medical documentation to the ER Department had it been requested. Indeed, why not? ER knew everything anyway.

Issues regarding confidentiality pertained to her co-workers and that is a perfectly reasonable and legitimate request. Under the FMLA law May Company had to treat her medical information confidential. The fact that she demanded confidentiality about her surgery should not be used as a tool to invalidate her rights to FMLA as Judge Smith of the U. S. Court of Appeals did with his decision.

The trial error relates to a critically flawed jury instruction, which the trial judge refused to correct. At issue was proper notification. For lack of proper jury instructions the jury was led to believe that a FMLA Poster in the ER Department, and a memo distributed in *1993,* when FMLA was first enacted, was sufficient notice advising Sanders of her FMLA rights.

Just prior to the closing argument, and again during the closing at sidebar, counsel for Ms. Sanders objected that the jury instructions do not make it clear that the Employer's Written Notice has to be given to the employee *after* learning of the need for leave; the judge refused to make any changes. The jury was free to find that any written advice about FMLA rights, no matter how long in the past, complied with the law. This was prejudicial legal error on a key point of Sanders' claim. May Company capitalized on the instructional error in the closing, where Ms. Tierney argued that Sanders had "notice" of FMLA based on a 1993 handout

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is that Sanders did not have a "rabid desire" for confidentiality with the Employee Relations Department as May Company would like to present.

(which Sanders read in the year 1993) and on a FMLA poster in Human Resources. [10] Ms. Tierney's closing:

> "[Ms. Sanders] also testified she received a memo from Steve Begard in 1993, she saw it, it was a memo explaining all the rights and privileges of FMLA and she knew she'd gotten that memo, too. And there was a posting when she went to see Ron Antoniewicz, there's a big FMLA posting that we saw also. So Terry Sanders had notice of FMLA, she knew she could take sick leave. She chose not to, ladies and gentlemen, because she wanted to leave the company." App. IV p001982 (Tr. Vol IV at p36, lines 17-25) (Tierney's closing, May Company's attorney).

The judge's error caused the jury to be improperly instructed on a substantive area of law critical to Sanders' case, namely, the law's requirement that the employer provide written notice of FMLA rights and obligations *after* learning that the employee may need FMLA leave. The seriousness of the judge's error is self-evident because the absence of timely written notice by May Company is the foundation of Sander's interference claim. See 29 C.F.R. §825.301(b)-(c) on what constitutes proper notice.

The U.S. Appeal Court is dismissing the improper notification by claiming Sanders was not prejudiced by improper notification because she would not have taken FMLA anyway (ref. Ap. A, footnote #9). The Appeal Court supports their opinion by sighting the recent *Ragsdale v Wolverine* FMLA decision of the U.S. Supreme Court. *Ragsdale v. Wolverine Worldwide*, 535 U.S. 81(2002; 29 C.F.R. §825.112(a); 29 C.F.R. §825.302(c).

The way the Eighth Circuit Court used U.S.S.C. Justice Kennedy's opinion makes it impossible to appeal an error at trial. A "legal trap" is created.

Here is what is happening: Because Sanders lost at trial, possibly because of this improper notification issue, it must

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[10] Sanders testified she never saw the poster in the ER Dept. Sanders testified that she did recall the memorandum of 1993, however, she did not remember it in 1998 at the time she needed FMLA leave.

now be assumed that all "facts" must be decided in favor of May Company. May Company earlier claimed at trial that Sanders rejected FMLA (this is "the trap"). The result is that it can now be claimed that Sanders was "not prejudiced" by the improper notification because Sanders would not have taken FMLA anyway. Because it was claimed that Sanders rejected FMLA the Appeal Court can dismiss any trial mistake, no matter how serious, on the grounds that she was not prejudiced. The mistake may have been the reason for the loss at trial in the first place! If the U.S.S.C. *Ragsdale v Wolverine* "not prejudiced opinion" can be used in this manner there is no chance for the party seeking appeal of a trial error to succeed.

Disputed trial testimony should not be used to dismiss a serious trial error by claiming the loosing party was "not prejudiced". Appeal Court Judge Smith is basing his decision on disputed testimony. Sanders testified that the issue of FMLA or medical documentation did not even come up during the 40 minute March 16 meeting with Antoniewicz. The disputed testimony has no basis in fact other than what Antoniewicz said during a deposition. It does not even make logical sense that Sanders would take a leave without job protection over a leave with absolute job protection. This is true even if it is thought that one may not return (take the secure leave "just in case".) [11] We spoke above that the issue of confidentiality was a concern to Sanders only as it related to her co-workers. She was always candid with the Employee Relations Department.

In saying all this we are not asking the U.S.S.C. to give consideration to the logic surrounding an alleged rejection of FMLA leave. What we are saying is that the "not prejudiced" conclusion of the Appeal Court (sighting the *Ragsdale* case) is being misused. The U.S. Court of Appeals should give first

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[11] Sanders testified that May Company presented their Personal Leave as one she could return from. This would make Personal Leave for all intents and purposes equivalent to FMLA. Thus, assuming she was provided a choice, it would have made no difference as to what leave she chose.

priority to the correction of serious trial errors, realizing that the error at trial could have been the reason for the loss at trial. Recognizing and correcting errors at the lower court trial should trump speculation that Sanders would not have taken FMLA anyway. We ask that this court recognize the lower court trial error in regard to improper, inadequate, and untimely notification and reject the Appeal Court opinion that Sanders was not prejudiced by the error.

Review of Question 7: At no time did May Company give Ms. Sanders an equivalent position under FMLA.

This issue becomes of significance only if this Court reverses the verdict on Counts I or II.

In 1999, May Company rehired Sanders and terminated Sanders a second time after 2-½ month. May Company said the termination was legal because she was hired under probation (ref. Ap. E, #27 and #78).[12] The judge allowed the jury to decide whether this rehire was a FMLA "equivalent" position. As a matter of law, the job that May Company rehired Sanders into in 1999 was not a FMLA equivalent position because the position was probationary and was not given to Sanders upon her return from a FMLA leave.

Regulation 29 C.F.R. § 825.215 "What is an equivalent position?" governs the requirements for an equivalent position.

As a matter of law and undisputed facts, the equivalent position issue should have been decided in favor of Sanders. The jury should not have been allowed to decide this issue.

Summary of Case and Reasons for Granting Writ

Sanders went to Ron Antoniewicz, the Manager of Employee Relations (ER), on 3/16/98 with a letter describing her surgery and offering a resignation, but wanted severance pay if she were to resign. Severance pay was denied. Sanders inquired as to other options. Antoniewicz said he

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[12] Sanders stated at trial that the terms of her rehire were unconditional (see Ap. E, letter from May's attorney, #78).

could try to provide a leave of absence. Sanders *asked* Antoniewicz to pursue the leave of absence. A 13-week leave of absence was offered by May Company and accepted by Sanders. This petition should be granted to ensure that employee rights to Federal Entitlements are protected if an offer of resignation is rejected by the employer (question 2).

Antoniewicz claims FMLA leave and Personal Leave were both offered and that Sanders waived FMLA leave. Sanders testified that only one leave was offered, Personal Leave. She would not find out that FMLA covered her surgery until after she was terminated. We contend that a Federal Entitlement, FMLA, cannot be waived or dismissed based on a *purported* oral decline; absolutely not without knowledge of that which is being waived. This petition should be granted to give effect to the anti-waiver provision of FMLA and resolve the conflicting Appeal Court decisions in this area (question 4).

We are *not* asking this court to decide on what version of events is true. We do use this to make the point on why the FMLA regulations require a prompt *written* explanation. There is far less opportunity for employer dishonesty or false memories occurring when the employer must comply with an "in-writing" requirement.[13] There was never any written documentation pertaining to FMLA leave, medical certification, or May's Personal Leave. This petition should be granted to give effect to the FMLA regulations that require a prompt written explanation of FMLA when the employer recognizes (or should have recognized) the FMLA implication. Past lower court decisions have been inconsistent in giving effect to the Department of Labor regulations (question. 5).

Sanders qualified for FMLA having met the three requirements: eligible employee, provided notice to

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[13] The only person Sanders had contact with regarding her leave was Antoniewicz. Everything Sikyta, VP of the ER Dept., learned about Sander's leave came from Antoniewicz. The point: it only takes one employee at a company to be mistaken or dishonest to potentially deny an employee their right to FMLA.

employer, and had a serious health condition. Antoniewicz testified that he *recognized the FMLA implication* and actually offered Sanders FMLA. The petition should be granted to clear up conflicting U.S. Appeal Court decisions regarding employer strict liability under FMLA (question 1).

Sanders entered the hospital to have surgery 6/3/98. She was discharged nine days later. May Company's 13-week Personal Leave ran *concurrent* with Sander's qualification for FMLA leave, therefore, Sanders Personal Leave should have been considered the equivalent of FMLA the day she entered the hospital, 6/3/98. This petition should be granted so as this court can rule that FMLA, a Federal Entitlement, establishes a *minimum standard of job security* (question 3).

May Company refused to return Sanders to any position despite a letter from Sanders requesting a return date of 6/29/98. May Company was provided medical documentation with this letter. Sanders was terminated 7/31/98 after her 13-week leave expired. This petition should be granted to give effect to the FMLA regulation that entitles the employee to FMLA until the employment relationship is terminated (question 2).

The Eighth Circuit Court of Appeal dismissed a serious trial error by claiming Sanders *was not prejudiced* by the error because she did not want to provide medical documentation. The Appeal Court should be cognizant of the possibility that a trial error could be the reason for a trial loss. A trial loss results in all "facts", no matter how speculative, being decided in favor of the prevailing party; the potential misuse of the *Ragsdale* U.S.S.C. caveat is made possible. In this case there was no request for medical certification, however, key FMLA regulations were dismissed based on Sander's legitimate demand that her medical information be kept confidential. The FMLA regulations dismissed pertained to timely and proper notification. The jury was led to believe that a memorandum distributed in 1993 and a Poster in the ER Department sufficed as proper FMLA notice. The Appeal Court's *priority* should have been to correct this serious trial error. This petition should be granted so as this

misuse of *Ragsdale* never occurs again (question 6).

Sanders was rehired about 7 months after her requested return date of 6/29. She was terminated 2 ½ months later. May Company claims the termination was legal because she was rehired under probation. This petition should be granted to give effect to the FMLA regulations that define an equivalent position (question 7).

CONCLUSION

This petition for a writ of certiorari should be granted for the reasons:

- To resolve the Eighth Circuit Court of Appeal Opinion with past Court of Appeal Opinions (particularly *Cross, King*, (both 7th Cir.), *Ragsdale., Spangler, and Thorson* (all 8th Cir.).
- To clarify the extent to which the lower courts must give effect to DOL FMLA regulations (particularly to the requirement of *written* notification).
- To correct the misuse of U.S.S.C. *Ragsdale v Wolverine* opinion regarding (allegedly) the Plaintiff not being prejudiced by a serious error at trial.

Petitioner additionally requests a new trial on the issue FMLA retaliation because the whole trial was tainted for lack of proper jury instructions and other errors at trial.

Respectfully submitted,

Terry Sanders
1813 Southcross Dr. W #2501
Burnsville, MN 55306
Phone: 651-592-7270

April 10, 2003

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-3344

Terry Sanders,

Appellant,

v. Appeal from the United States District Court for the Eastern District of Missouri.

May Department Stores Company,

Appellee.

Submitted: September 12, 2002

Filed: January 9,2003

Before HANSEN, Chief Judge, RILEY and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Terry Sanders ("Sanders") brought this employment action alleging that her former employer, the May Department Stores Company ("May"), violated the Family and Medical Leave Act ("FMLA"). Following trial, the jury entered a verdict in favor of May on all counts. Sanders appeals the District Court's[1] denial of her post-verdict motion. We affirm.

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[1] The Honorable Donald J. Stohr, United States District Court Judge for the Eastern District of Missouri.

I.

May hired Sanders as a financial analyst in October 1984. Sanders, then a male, worked productively at the company for nearly thirteen years until the spring of 1998. In March of that year, Sanders informed May that she suffered from gender dysphoria. [2] To address this condition, Sanders told May that she intended to undergo gender reassignment surgery on June 4, 1998. Moreover, following the surgery, Sanders would no longer consider herself a male, but a female.

Sanders also informed May that in order to prepare for this surgery, she was required to live as a woman for four to six weeks preceding the procedure. She expressed particular concern that some level of confidentiality be maintained during this pre-surgical lifestyle adjustment. In particular, she wanted to avoid workplace disclosure of her impending life change. Sanders especially emphasized that she did not desire this disclosure because of the adverse effect such disclosure might have on her spouse of twenty-five years. Consistent with her desire for privacy, Sanders tendered her resignation.

In stating her intent to resign, Sanders also acknowledged her understanding that if she did not resign prior to surgery, she could have received sick pay during convalescence. As

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[2] Gender dysphoria, also known as transexualism, has been defined as:

> The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment.

Harry Benjamin Intll Gender Dysphoria Assoc., *Standard of Care for Gender Identity Disorders* (6th ed. Feb. 2001) *available at* http://www.hbigda.org/socv6. pdf; *see also Davidson v. Aetna & Casualty Ins. Co.*, 420 N.Y.S.2d 450,452 (N.Y. Sup. Ct. Trial Term 1979) (defining gender dysphoria).

consideration, she sought from the company what she described as "due financial consideration" and a "leave of absence." Specifically, she wanted to cease reporting for duty in April, but continue as an employee through May 1, 1998. Sanders gave other personal grounds for this consideration.

In reply, May explained to Sanders that severance pay was not an option under company policy because her departure was voluntary. May also expressed concern at this time that Sanders was leaving a job she had held for more than thirteen years. Sanders stated that she understood, but that her decision was well-reasoned. She had plans to rendevous in another state with her future partner, who was going to provide and care for her during her recuperative period. Afterwards, they planned to marry and begin their life together in that state.

During this time, a representative of May's human resources office informed Sanders that she might qualify for FMLA leave. This representative also explained that in order to qualify for leave, the statute required Sanders to provide medical certification of the need for leave. Sanders reasserted her intent to resign and, because of her confidentiality concerns, stated that she did not want to provide the FMLA required medical certification.

May's personal-leave policy allows an employee to receive up to one week of leave for each year of service, at May's discretion. After the leave expires, if the employee wishes to return to work, he or she may do so if there is a position available. Under its personal-leave policy, May is not obligated to hold the position open for the employee. As an employee of thirteen years, Sanders was eligible for, and received, thirteen weeks of personal leave. The leave expired at the end of July 1998.

In June 1998, during the leave period, Sanders underwent

gender reassignment surgery. However, Sanders's personal plans apparently changed, and she sought reinstatement with May. May, however, had not reserved Sanders' previous position.

Nevertheless, May did rehire Sanders on February 16, 1999, to work as a Senior Financial Analyst in its MIS department. This position differed from the one she previously held for the company.

On April 30, 1999, May terminated Sanders for poor performance. As a result, in March 2000 Sanders filed this action against May seeking damages for its alleged violation of FMLA.

II.

Sanders first appeals the denial of her post-trial "Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial [3] In the motion, Sanders argued that: (1) the jury's verdict was contrary to the evidence presented at trial; (2) May did not satisfy its FMLA notice requirements; (3) she did not volitionally waive her FMLA rights; (4) she was entitled to a new trial based on her retaliation claim. In addition, Sanders appeals the District Court's refusal of several of her jury instructions. As discussed below, each of these arguments is without merit.

A. Judgment as a Matter of Law or New Trial

Our review of a district court's denial of a motion for judgment as a matter of law is conducted de novo. We will evaluate all evidence and all reasonable inferences in the light most favorable to the prevailing party. *Moring v. Arkansas Dept. Of Correction*, 243 F.3d 452,455 (8th Cir. 2001); *Vetter v. Farmland Indus. Inc.*, 120 F.3d 749, 752 (8th Cir. 1997).

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[3] Based on the substance of Sanders's argument, we conclude that she filed this motion seeking judgment as a matter of law, in spite of the title of the motion.

We will not disturb a jury's verdict unless we determine that no reasonable juror could have found for the non-moving party based on the trial record. *Moring*, 243 F.3d at 455. We review the denial of a motion for a new trial for an abuse of discretion. *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 495 (8th Cir. 2002). "The key question is whether a new trial should have been granted to avoid a miscarriage of justice." *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000) (citations omitted).

1.

Sanders first argued that the jury's finding was contrary to the evidence presented at trial. At trial, the jury found that May did not violate FMLA when it awarded her only personal leave instead of FMLA leave (in spite of her FMLA eligibility before her sexual reassignment surgery). An eligible employee, such as Sanders, may take FMLA leave for a period not to exceed twelve months "because of a serious health condition that makes the employee unable to perform the functions of his or her job." 29 V.S.C. § 2612(a)(1); *see also*, 29 C.F.R. §825.112(a). However, in order to invoke the protections of FMLA, an employee must notify his employer of his "intention to take leave." 29 V.S.C. §2612(e)(2)(B). At a minimum, an employee must give "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave." 29 C.F.R. §825.302(c). While the employee does not have to mention FMLA by name, the employee has an affirmative duty to indicate both the need and the reason for the leave. 29 C.F.R. §825.302(c). Thus, in evaluating the jury's verdict, we must first consider whether Sanders made a valid request for FMLA leave.

Sanders planned to have a sex change operation in June 1998. She notified May that she wanted to resign no later than May 1, 1998, in order to maintain a level of anonymity during the month prior to the operation. At that time, Sanders stated her intent clearly and articulated several factors supporting her

decision. She: 1) feared ridicule from peers and colleagues; 2) anticipated impending trouble at the workplace from an ex-boyfriend; 3) believed that if she resigned her position prior to the surgery she would spare her spouse a measure of grief; 4) planned to move to another state with her future fiancee and begin life anew.

Also at the time of her resignation, Sanders requested severance pay noting that her departure prior to undergoing her scheduled surgical procedure would save May the expense of providing her with covered medical leave if she remained in its employ. Alternatively, Sanders requested that she be allowed to take a "leave of absence" during the month of April so that she would still accrue additional vacation leave until May 1, 1998. In response to Sanders dual request, May suggested that there was a "possibility" that she would qualify for FMLA leave. [4] Sanders refused because she would be required to supply the company with a medical certification delineating her qualifying health condition. Thus, it is plain from these facts that Sanders did not actually attempt to pursue FMLA leave. This refusal was consistent with her articulated desire for non-disclosure of her gender reassignment. Instead of FMLA leave, May granted Sanders thirteen weeks of personal leave (one week for each year of service), which allowed her to continue receiving corporate benefits including medical insurance and accrual of leave.

Sanders attempts to get around these facts. First, she argues that she provided May with sufficient notice of her need for FMLA leave because May acknowledged the possibility that her sexual reassignment would be an FMLA-qualifying event. However, such a conclusion is untenable; it ignores the fact that she dismissed the option outright. We hold May was

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[4] Because it is not essential to the resolution of the issues before us, we decline to address whether sexual reassignment qualifies as a serious-health condition under FMLA.

not obligated to ignore Sanders's express resignation.

Second, Sanders also maintains that because May granted her personal leave, it cannot be said that she also resigned her position. However, there is no mutual exclusivity to the grant of a personal leave and a resignation. Sanders, herself, best makes this point. In a letter she authored in March 1998, Sanders informed one of her physicians that she would "be resigning" after a "leave of absense [sic]" and that she would be moving near her "boyfriend and future fiancee." She also noted in the letter that her "last day of work in the St. Louis area will be Thursday, April 23, 1998."

Therefore, because Sanders did not actually pursue FMLA leave, and in fact, expressly rejected it, we conclude that a reasonable jury could determine that Sanders failed to request FMLA leave. As a result, a reasonable jury could further conclude that May had not violated FMLA.

2.

Sanders next argues that the trial court erred when it refused to grant her a judgment as a matter of law on her claim that May did not satisfy its notice obligations under FMLA. Sanders relies on 29 C.F.R §825 .30 1 (c), which requires an employer to provide an employee with written notice. 29 C.F.R §825 .30 1 (c) (stating that an employer must provide an employee with written notice "no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). "). The notice must detail an employee's specific expectations and obligations under FMLA and explain any consequences of a failure to meet those obligations. *Id.*

Under §825.301(c) of the FMLA, the detailed employer written notice obligation Sanders cites arises only after an employee gives sufficient information to the employer to

apprize it of the need for leave due to a serious health condition. If an employee gives insufficient or no notice of a serious health condition, § 825 .301 (c) does not apply. If Sanders failed to properly notify her employer of her need for leave, her employer would be under no obligation to comply with the requirements of 29 C.F.R §825.301(c). May presented evidence at trial that Sanders had been informed of her FMLA rights. The notice required by 29 C.F.R. 825.300(a) had been posted in May's human resources offices since FMLA's inception. Moreover, Sanders acknowledged that she received a memorandum from May describing FMLA's protections as well as her rights and obligations as an employee. Given these facts, we hold a rational jury could resolve this issue against Sanders, and the trial court did not err in refusing to grant judgment as a matter of law in her favor.

3.

Sanders next argues that the District Court erred when it denied her request for judgment as a matter of law on the issue of whether her decision to forego the FMLA leave option was volitional. She contends that May coerced her to waive her FMLA rights in a "trade-off' for personal leave under its policy. To buttress her argument, Sanders cites 29 C.F.R. §825.220(d). This section states that neither may employees "waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees. . . cannot "trade-off' the right to take FMLA leave against some other benefit offered by the employer." *Id.* Sanders supports her argument with a May employee's deposition testimony. In it, the employee stated that she believed that Sanders chose personal leave over FMLA.

However, to the extent that Sanders "chose" personal leave, it was by forfeit. She was informed of the possibility of FMLA leave (and the accompanying medical certification requirement) and for understandable personal reasons, opted

not to pursue the FMLA alternative. The record before us does not support Sanders's contention that May required her to "trade away" her FMLA rights. In finding otherwise, the trier of fact was justified. Accordingly, we affirm the District Court's denial of Sanders's request for judgment as a matter of law.

4.

Sanders also contends that the District Court should have granted her a new trial. Sanders argues that May fired her from the second position she held at May in retaliation for complaining that her FMLA rights had been violated in 1998. Sanders concedes that this claim rests on our disposition of her previous claims. The jury determined that May terminated Sanders from her second position based on poor performance. The District Court refused to grant a new trial on that issue, and Sanders has not stated sufficient basis for this Court to conclude differently on appeal.

B. Jury Instructions

Finally, Sanders argues that the District Court erred when it refused several of the jury instructions submitted at trial. We review the jury instructions given by a district court for an abuse of discretion. *See Brown* v. *Sandals Resorts Int'l*, 284 F.3d 949, 953 (8th Cir. 2002). "Our review is limited to whether the jury instructions, taken as a whole, fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury in a particular case." *Id.* (citations omitted). We will not reverse "unless we find that the error affected the substantial rights of the parties." *Fogelbach* v. *Wal-Mart Stores, Inc.*, 270 F.3d 696, 699 (8th Cir. 2001). Sanders alleges that because the instructions she submitted were not accepted, she did not receive a fair trial. We disagree and find no abuse of the District Court's discretion.

Instructions 1B, 2, and 5 (note 5) required the trial court to make a determination that Sanders could not refuse FMLA

leave. The evidence demonstrated that May told Sanders that she might qualify for FMLA leave. Sanders declined, stating that she wanted to resign. There is no legal requirement that an employer must give an employee FMLA leave after such an offer has been rejected. Because each of these three instructions would, therefore, contain inaccurate declarations of the law, the District Court properly refused them.

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note 5: The instructions read in their entirety:

Instruction 1 B
You have heard testimony from Ron Antoniewicz that at a meeting with Plaintiff on March 16, 1998 [sic] he mentioned FMLA to Plaintiff and that Plaintiff immediately refused FMLA leave. Whether or not you believe such testimony from Ron Antoniewicz, I have decided that, under the applicable law, Defendant's obligations toward Plaintiff under FMLA, [sic] did not end because of Plaintiffs purported refusal of FMLA during the March 1998 meeting. I express no opinion, in this instruction, on any other issue in the case.

Instruction 2
You have heard testimony from Ron Antoniewicz that at a meeting with Plaintiff on March 16, 1998 [sic] he mentioned FMLA to Plaintiff and that Plaintiff immediately refused FMLA leave. You have heard testimony that Plaintiff "Chose" [sic] a personal leave over a FMLA leave. Whether or not you believe such testimony, I have decided that, under the applicable law, Plaintiff did not waive or give up any of Plaintiffs FMLA rights as a result of the alleged refusal of FMLA or choosing of the personal leave during the March 1998 meeting. I express no opinion, in this instruction, on any other issue in the case.

Instruction 5

You have heard testimony from Ron Antoniewicz that at a meeting with Plaintiff on March 16, 1998 [sic] he mentioned FMLA to Plaintiff and that Plaintiff immediately refused FMLA leave. Whether or not you believe such testimony from Ron Antoniewicz, I have decided that, under the applicable law, Plaintiff did not waive or give up any of Plaintiffs FMLA rights as a result of the alleged refusal of FMLA during the March 1998 meeting. I express no opinion, in this instruction, on any other issue in the case.

Proposed Instruction 1A (note 6) asked the court to state that it had decided Sanders's second period of employment with May was not an "equivalent position." The effect of such an instruction would have caused the District Court to engage in fact- finding. That role is preserved for the members of the jury. As such, the District Court was correct to refuse it. Even if this was not the case, the record supports the conclusion that May's decision to rehire Sanders in 1999 was an independent event and was not a retroactive application of FMLA.

Instruction 4 (note 7) also asked the trial court to engage in fact-finding. Specifically, Sanders asked for an instruction to the jury stating that she had given May sufficient notice of her desire to take FMLA leave in March of 1998. The adequacy of one's notice in the FMLA context is not a question of law, but rather a fact issue. *See Hopkins v. Quitman County Hasp. & Nursing Home, Inc.*, 126 F.3d 635,640 (5th Cir. 1997) ("[I]t is our opinion that the adequacy of Hopson's notice is a fact issue."). Thus, the trial court properly refused to submit this instruction to the jury.

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note 6: The instruction reads in its entirety:

Instruction 1A.
I have decided that Plaintiffs second period of employment with May Company, from February 1999 to April 1999, is not an "Equivalent Position" as defined in Instruction No. 19.

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note 7: The instruction reads in its entirety:

Instruction 4.
I have decided that on March 16, 1999, Plaintiff gave sufficient "Notice" (to May Company) of the need for FMLA leave for planned medical treatment. I express no opinion, in this instruction, on any other issue in the case.

Sanders's final argument is that the trial court failed to properly explain to the jury the following: after Sanders gave notice to May of the need for leave, May was required to give her written notice of her rights and obligations under FMLA. The verdict director, Instruction 14a, sets forth the elements of this count [8]. Furthermore, Instruction 14b goes on to state what an employer must tell an employee in order to adequately advise her of her rights. As a result, the verdict directors make clear that an employer's duty to advise an employee of her rights under FMLA must come after notification of the need for leave.[9] Therefore, we conclude that neither did the trial court abuse its discretion in refusing the instruction, nor did Sanders suffer any resulting prejudice from the instruction that was given. Moreover, to the extent that Sanders argues that the District Court's refusal to grant the requested instructions inflamed and prejudiced the jury, her argument is unpersuasive. She offers no convincing argument on appeal to support such a contention.[10]

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[8] That: Sanders had to give notice of her intent to take a leave, she had to prove she had a serious health condition, May had to fail to adequately advise her of her rights and obligations, and because of May's failure to adequately advise her, she forfeited her FMLA rights.

[9] Notably, even if this instruction is incomplete, Sanders suffered no prejudice. There was sufficient evidence in the trial record that Sanders did not give notice of her intent to take a leave, she did not have a serious health condition when her leave commenced, and she was not damaged by not receiving any written notification of her rights after meeting with May officials in March 1998. *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81(2002); 29 C.F.R. §825.112(a); 29 C.F.R. §825.302(c). Sanders did not want FMLA leave in March 1998 because she was afraid of others learning of her secret life and plans. When orally told of her leave options, she refused to provide the necessary documentation. Sanders's rabid desire for confidentiality did not change until months later. As Sanders suffered no prejudice, even if this instruction were incomplete, it was harmless error, not a basis for reversal of the verdict in this case. *Scamardo* v. *Scott County*, 189F 3d 707, 711 (8th Cir. 1999).

[10] Finally, because we affirm the District Court on all points, we need not address whether Sanders's position at May after her rehiring constituted an

Accordingly, for the foregoing reasons, the decision of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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equivalent position for purposes of the FMLA.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3344

Terry Sanders,

Appellant,

vs. Order Denying petition for Rehearing and for Rehearing En Banc

May Department Stores Company,

Appellee.

The petition for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

(5128-010199)

February 12, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TERRY SANDERS,)
)
Plaintiff) No. 4:00CV576-DJS
)
Vs)
)
THE MAY DEPARTMENT STORES
COMPANY,)

Defendant

ORDER

Upon careful consideration,

IT IS HEREBY ORDERED that plaintiff's motion for judgment notwithstanding the verdict, or, in the alternative for a new trial (Doc. #61) is denied.

Dated this 15th day of August, 2001.

\s Donald Stohr
UNITED STATES DISTRICT JUDGE

Stamped Here:
FILED
Aug 15 2001
U. S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

Statutes:
29 U.S.C. §2601, et seq.
Sec. 2601. - Findings and purposes
(a) Findings
Congress finds that -
(1)
the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
(2)
it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
(3)
the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
(4)
there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;
(5)
due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
(6)
employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.
(b) Purposes
It is the purpose of this Act -

(1)
to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
(2)
to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
(3)
to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
(4)
to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
(5)
to promote the goal of equal employment opportunity for women and men, pursuant to such clause

29 U.S.C. §2612(a)(d)
Sec. 2612. - Leave requirement
(a) In general
(1) Entitlement to leave
Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(D)
Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. §2612(e)(1)
(e) Foreseeable leave
(1) Requirement of notice
In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

29 U.S.C. §2613(a)
Sec. 2613. - Certification
(a) In general
An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

29 U.S.C. §2613(c)
(c) Second opinion
(1) In general
In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider

designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

29 U.S.C. §2614(a)
Sec. 2614. - Employment and benefits protection
(a) Restoration to position
(1) In general
Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave -
(A)
to be restored by the employer to the position of employment held by the employee when the leave commenced; or
(B)
to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. §2615(a)(1)
Sec. 2615. - Prohibited acts
(a) Interference with rights
(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. §2617(a)(1)
Sec. 2617. - Enforcement
(a) Civil action by employees
(1) Liability
Any employer who violates section 2615 of this title shall be liable to any eligible employee affected -

(A)
for damages equal to -
(i)
the amount of -
(I)
any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
(II)
in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;
(ii)
the interest on the amount described in clause (i) calculated at the prevailing rate; and
(iii)
an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and
(B)
for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

Regulations:

Sec. 825.112(a)
(a) Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;
(2) For placement with the employee of a son or daughter for adoption or foster care;
(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and
(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

29 C.F.R. §825.207(e)(h)
(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off" may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (e.g., notice of certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied or the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent

medical certification requirements of the employer's sick leave program. See Secs. 825.302(g), 825.305(e) and 825.306(c).

29 C.F.R. §825.208(a)

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section.....

(a)(2) As noted in Sec 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave.

29 C.F.R. §825.208(b)(1)

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for

an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entit'ement.

29 C.F.R. §825.213 (a)

(a) In addition to the circumstances discussed in Sec. 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:.....

29 C.F.R. §825.215 (a)

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, and responsibility, and authority.

29 C.F.R. §825.220(b)(d)

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.....

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see Sec. 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12 month period, including all FMLA leave taken and the period of "light duty."

29 C.F.R. §825.301(b)-(c)

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations..... Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement; (see Sec. 825.208;

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see Sec. 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits.....

(v) any requirement for the employee to present a fitness-for duty certificate to be restored to employment (see Sec 825.310);

(vi) the employee's status as a "key employee" ..... (My note: This is not applicable to Sanders.)

(vii) the employee's right to restoration to the same or an equivalent job upon return...

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see Sec. 825.213).

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a) (2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given by the employee - within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

29 C.F.R. §825.301(2)(i)
(2)(i) Except as provide in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.
(ii) Subsequent written notification shall not be required if the initial notice in the six-months period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty report would be required..... Where subsequent written notice is not required, at least oral notice shall be provided. (See Sec. 825.305(a).)

29 C.F.R. §825.302(c)
(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about

whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and my request medical certification to support the need for such leave (see Sec. 825.305).

29 C.F.R. §825.311(a)

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (i.e. within 15 calendar days, if practicable), until the required certification is provided.

29 CFR 825.312(a)(b)(e)

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of FMLA leave until an employee submits the certificate…..

(e) An employer may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See Sec. 825.309.) If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is

terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible, the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

29 C.F.R. §825.315(d)

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

STATEMENT OF FACTS

Note: References to trial transcripts, depositions, addendum, appendixes, and exhibits relate to Ms. Sanders Eighth Circuit Court of Appeal submissions. They are not supplied with this petition because of their large volume and detail.

The parties agreed to stipulations which contain an agreed overview of the case. The statement of facts will first present the agreed facts. Then we will list the additional facts from the trial that are most relevant to this appeal.

Joint Stipulation of Uncontested Facts:

I. Brief Summary

The general facts of this matter are that Ms. Sanders worked for May Company as a man for 13 years. In mid-March, 1998, Ms. Sanders informed May Company through its human resources manager Ron Antoniewicz ("Antoniewicz"), that he was planning to have a sex change operation in a few months. Ms. Sanders gave May Company a letter setting forth details about his future plans. The parties dispute the meaning of this letter. After a series of disputed events, Ms. Sanders' employment ended in 1998. May Company rehired Ms. Sanders (now a female) in February, 1999. May Company terminated Sanders' employment 2 ½ months later on April 30, 1999. Ms. Sanders contends the termination was unlawful. May Company contends the termination was lawful.

II. Stipulated Uncontested Facts

1. On or about March 9, 2000, Ms. Sanders filed this lawsuit alleging that May Company violated her rights under the Family and Medical Leave Act of 1993 ("FMLA").

2. Ms. Sanders is an "eligible employee" under the FMLA, in that Ms. Sanders meets the length of service requirements and that May employs the requisite number of people.

3. Ms. Sanders began working for May Company in October of 1984 as a "financial analyst" in the electronic data processing department. Ms. Sanders' employment ended in 1998. Ms. Sanders was rehired February 1999 into the Management Information Systems Department as a Senior Financial Analyst. May Company terminated Ms. Sanders' employment April 30, 1999.

4. In mid March 1998, Ms. Sanders met with Ron Antoniewicz, a manager in May's Corporate Human Resources Office, and gave him a letter dated March 11, 1998.

5. May has a personal leave policy (different from its FMLA leave policy). May's personal leave policy allows an employee to receive up to one week of personal leave for each year of service, at May's discretion. After personal leave expires, if the employee wishes to return to work, he or she may do so if a position is available. For an employee who take personal leave, May will not hold a position open for the employee.

6. On or about June 3, 1998, Ms. Sanders entered the hospital for gender reassignment surgery.

7. On or about June 4, 1998, Ms. Sanders had the gender reassignment surgery.

8. On or about June 11, 1998, Ms. Sanders was discharged from the hospital.

9. Ms. Sanders' ending salary was $57,800.00 per year in 1998.

10. Ms. Sanders' salary was $57,800.00 per year upon rehire of February, 1999.

Stipulations (App. X p002122) (In the original, the terms "Plaintiff" and "Defendant" appear, replaced by "Ms. Sanders" and "May Company" for purposes of this Brief).

11. Ms. Sanders' letter, dated March 11, 1998, Sanders Trial Exhibit 1, was read into the record. The letter is reproduced in the Addendum (Court of Appeal submission).

12. *Ron Antoniewicz* - Manager of Human Resources for May Company during the period March 1998 through July 1998, testified by video deposition as a joint witness for both parties. Citations to his testimony are citations to the transcript of his deposition, which appears in App. V. Antoniewicz's video deposition was played at trial.

13. *Jayne Sikyta* - Vice-president of Human Resources for May Company during all relevant times, testified for Ms. Sanders by deposition as corporate designee, and for May Company live at trial. Citations are either to Sikyta's redacted deposition as read at trial, in App. V, or to the transcript pages of her live testimony on behalf of May Company.

14. Ms. Sanders was employed by May Company in St. Louis as a Financial Analyst from October, 1984, to the termination date of July 31, 1998, with a last work day of April 23, 1998. *E.g.* App. V p002064 (Ex 4 - May Company's Service Letter of October 21, 1998 at paras 2-3).

15. Ms. Sanders' letter of March 11, 1998, presented to Antoniewicz at their mid-March meeting, discussed her impending hospitalization as follows: (all passages from Addendum and App. V p002053-p2056):

a. "This surgery is scheduled for me June 4." Id. page 1 para 2).

b. "The surgery is major and requires a one day early check in for lab blood tests, a nine day hospital stay, and about another two weeks of convalescing at home." Id. page 2 para 8.

c. Ms. Sanders states the names, addresses, and phone numbers of her three doctors, and describes the reason she is seeing each doctor: Eugene A. Schrang, M.D., John Gregory, M.D., and Patricia E. Berne, Ph.D. Id. page 1 paras 6-8.

d. In addition to discussing the hospitalization and surgery, Ms. Sanders' letter also discussed a doctor-required thirty-day period of "Real Life Test" prior to the surgery, required by Dr. Berne. Id. page 2 para 4.

e. Ms. Sanders described her diagnosis as "Gender Dysphoria". Id. page 1 paras 4-10.

f. Ms. Sanders described the nature of her surgery as "sexual reassignment surgery." Id. page 1 para2.

g. Ms. Sanders described that she had been under doctor-ordered prescription drug therapy for a year. Id. page 1 at para 7.

h. Ms. Sanders' letter of March 11, 1998 mentions taking a leave of absence but does not mention FMLA. See Id. at page 2 para 9.

Addendum and App. V p002053-p002056 (Ms. Sanders' letter of March 11, 1998).

16. Ms. Sanders' letter of March 11, 1998 speaks for itself. The letter mentions resignation as follows:

On May 1, I am eligible for four weeks of vacation. I really don't think I can continue with my current employment much after that time... I am certain it would be in our

mutual best interest if I were to just resign. ***If it is in our best interest for me to leave***, I wonder if May Company could provide me ***some severance***. (Emphasis added.) App. V p 002060 (Ex. 1 page 2 paras 4-5) (emphasis added).

17. At the meeting of mid-March 1998, Antoniewicz interpreted Ms. Sanders' situation as entitling Ms. Sanders to FMLA, but he said that Ms. Sanders refused FMLA. App. V p002168-69 (Antoniewicz depo p12 line 15 to page 13 line 14).

18. Antoniewicz then met with his superior, Vice President Jayne Sikyta and they talked of Ms. Sanders' situation. Sikyta testified that she regarded Ms. Sanders as having refused Antoniewicz's offer of FMLA, so she did not explore the possible FMLA issue further and would not hold Ms. Sanders' job open: App. III p001736 -1737 (Tr. Vol 3, testimony of Sikyta, page 19 line 11 to page 20 line 23):

Q: (From Ms. Tierney for May Company) What was the issue?

A: In Ron's [Antoniewicz's] conversation with Terry, he had brought up the idea of FMLA, and was proceeding to explain our procedure in qualifying somebody for a FMLA leave. When he tried to talk to him about the doctor's certification, Terry said that he was very concerned about the confidentiality of that issue, and was not willing to go through the certification process.

Q: Did you believe this to be a covered FMLA situation?

A: Frankly, I needed to investigate that a little bit more. When Ron told me he started to offer FMLA, I was a little concerned that it may not have been covered by FMLA,

but since Terry had refused the doctor's certification, which is a key component of qualifying for FMLA, we did not pursue that.

Q: So, if I understand your testimony, you understood that Ms. Sanders had refused FMLA?

A: Yes.

[. . .]

Q: So, were you going to hold Mr. Sanders' position open until the surgery?

A: No, we were not. Because Mr. Sanders waived FMLA, we were not obligated to do that . . .

Id.

19. Sikyta testified that Ms. Sanders had a choice between FMLA leave and personal leave, and that she chose personal leave. App. V p002147 (Sikyta depo p. 85, lines 21 to 25); See also App. V p002129 (Sikyta depo p.19 line 4 to 15) (testifying that Ms. Sanders rejected FMLA rights because of not wanting to go through the certification process).

20. Ms. Sanders commenced a May Company "personal leave" on or about April 24, 1998 (undisputed).

21. Sikyta testified that she and Antoniewicz placed Ms. Sanders on a personal leave prior to May 1, [1998] to give Ms. Sanders a safety net should Ms. Sanders decide to return, and then they would look for a position for her. App. III p001737 (Tr. Vol 3 at page 20, lines 5-19).

22. In a "personal leave" May Company does not promise to restore Ms. Sanders to the job she held prior to the commencement of the leave, or promise to give her an

equivalent position. App. V p002146 (Sikyta depo p84 line 23 to p85 line2).

23. Sikyta testified that May Company did not have to hold Ms. Sander's position open because she had waived FMLA, and that May Company told Ms. Sanders they would try to fill her position immediately. App. III p001737-38 (Tr. Vol 3 at page 20, lines 20-25 to page 21 line1).

24. It was undisputed that on June 3, 1998, Ms. Sanders entered the hospital for surgery for Gender Dysphoria, and had the surgery June 4, 1998, and was discharged from the hospital on June 11, 1998. Stipulated Facts 6-8 - *supra*; App. V p002065 (Ex. 5- Dr. Schrang's letter).

25. It was undisputed that in mid-June 1998, after Ms. Sanders' surgery, Ms. Sanders' phoned Antoniewicz and they talked about her desire to return to work at May Company and told Antoniewicz "whatever position, no matter where it was within the company, would be acceptable." App. V p002228 (Antoniewicz depo p72 lines 2-14).

26. It was undisputed that on July 31, 1998, Antoniewicz sent Ms. Sanders a letter terminating her employment stating the following:

> "At this time I regret to inform you that the personal leave which May extended you has expired per company policy ...this was as a result of the company regrettably not being able to find an appropriate position for you....."
>
> "Your last day of employment (inactive status was effectively July 31, 1998. I have enclosed payment to you for 4 weeks vacation time as we agreed previously despite company policy which normally

would have allowed for no time since you have not actively worked for the company since April."

App. V p002061 (Ex. 2 -Termination Letter from Antoniewicz to Sanders dated July 31, 1998).

27. Jayne Sikyta testified that Ms. Sanders was subject to a 90 day probationary period upon rehire in 1999, because of a service break and reassignment to a new job, but would not have been so subjected if she had been returning from a FMLA leave without a break in service. App. III p001786-1787 (Tr. Vol III at p69 lines 6 to p70 line 24).

OTHER FACTS RELEVANT TO THE ISSUES OF FAILURE TO FOLLOW FMLA REGULATIONS AND INTERFERENCE WITH FMLA RIGHTS

28. Antoniewicz did not at any time request that Ms. Sanders submit medical certification. App. V p002138-39 (Antoniewicz depo p82 lines 22-25 to p 83 lines 1- 4) (Antoniewicz testified that Ms. Sanders had turned down FMLA so there was no need to ask for medical certification); App. V p002202 (Antoniewicz depo p. 46, lines 18-23); see also App. V p002129 (Sikyta depo, p.19 line 25 - p20 line14).

29. Antoniewicz did not give Ms. Sanders any FMLA-related forms. App. V p002202-03 (Antoniewicz depo p. 46 line 24 to p47 line 4).

30. Antoniewicz does not have a specific recollection of mentioning to Ms. Sanders that FMLA provides her with certain rights such as job restoration duration of leave. App. V p002197 (Antoniewicz depo p41 lines 8-22).

31. Antoniewicz did not make any contemporaneous memoranda regarding either Ms. Sanders' March 11, 1998,

letter or Antoniewicz's March 16, 1998, meeting with Ms. Sanders. App. V p 002212 (Antoniewicz depo p56 lines 20 to 24).

32. Antoniewicz and Ms. Sanders discussed the personal leave about one week after the March 16, 1998, meeting and during that second conversation they did not discuss FMLA. App. V p002198 (Antoniewicz depo p42 lines 12-25).

33. Antoniewicz did not discuss FMLA with Ms. Sanders during any conversation after March 16, 1998. App. V p002200 (Antoniewicz depo p44 lines 6-12).

34. Antoniewicz testified he would have put Ms. Sanders on FMLA, upon request by Ms. Sanders, a week after their mid-March meeting, and possibly up to the Ms. Sanders' personal leave actually began in April 1998. App. V p002204-05 (Antoniewicz depo p. 48 line 9 to 49 line 7).

35. Sikyta testified that Ms. Sanders' personal leave was to be six (6) weeks in her recollection, ending at the time of her surgery. App. V p002128 (Sikyta depo p14 line23 to p15 line19).

36. Antoniewicz testified that Ms. Sanders' leave was to be thirteen (13) weeks from the start. App. V p002184 (Antoniewicz depo p 28, lines 9-14) (but see *Id.* p002184 lines 18-20 where Antoniewicz does not guarantee that he actually told Ms. Sander, at the start of the leave, that the leave would be thirteen (13) weeks).

37. Ms. Sanders made a contemporaneous statement in a letter to a doctor that her leave would be thirty (30) days. App. V p002082 (Ex. 32 - Ms. Sanders' Letter to Dr. Mondello of March 24, 1998, at para 3).

38. Antoniewicz had several telephone conversations with Ms. Sanders between the time of March 16, 1998, and termination of Ms. Sanders' employment on July 31, 1998, but did not make any documentation of any of the conversations. App. V p002212 (Antoniewicz depo p56 at lines 15-24).

39. The level of confidentiality is lower under the "personal leave" than under FMLA leave. App. V p002192 (Antoniewicz depo p 36, lines 2 to 11).

40. May Company's personal leave program does not provide any benefits over FMLA, and is "certainly" less valuable than FMLA from a benefit/job protection standpoint, App. V p002199 (Antoniewicz depo p43 lines 4-17).

FACTS ON THE ISSUE OF MS. SANDERS' ALLEGED RESIGNATION

41. Jayne Sikyta testified at trial that May Company did not consider Ms. Sanders to have resigned because May Company did not terminate in April, but rather changed it to a personal leave. App. III p 001751 (Tr. Vol III testimony of Sikyta at page 34 lines 20-22).

42. Jayne Sikyta further testified that "if we had accepted the resignation, his employment with May Company would have ended in April that year. We did not take that resignation, but rather, agreed to the alternative of the personal leave [which] did expire on July 31st." App. III p 001751 (Tr. Vol III testimony of Sikyta at page 34 lines 3-7).

43. May Company's internal "May Separation Form" produced by May Company during this litigation shows a

separation date of July 31, 1998, due to "Personal leave ended and no other suitable position was available." App. V p002080 (Ex. 22).

44. On two occasions, Jayne Sikyta provided "service letters" to Ms. Sanders where, required by Missouri Statute 290.140 to be truthful, Sikyta explained that the true reason Ms. Sanders' employment was terminated July 31, 1998, was because Ms. Sanders' "personal leave" expired, and Sikyta did not claim that Ms. Sanders had resigned. App. V p002064 (Ex. 4 -May Company's Service Letter of October 21, 1998 at paras 2-3), App. V p002066 (Ex. 6 -May Company's Service Letter of June 4, 1999 at paras 2-3).

45. Antoniewicz did not record anywhere that Ms. Sanders had allegedly resigned employment during the March 16, 1998, meeting with Antoniewicz. App. V p002178-79 (Antoniewicz depo p22 lines 24-25, and p23 lines 1-19).

46. May Company did not confiscate Ms. Sanders' employee badge in April 1998 when the leave commenced, contrary to standard practice when an employee resigns or employment ends. App. III p 001741 (Tr. Vol. 3 testimony of Sikyta pg 24 lines 14-21).

47. On August 6, 1998, May Company generated an internal document in connection with an inquiry from the Frick Company, produced as part of this litigation, showing that the reason for separation was "End of personal leave and no other suitable position available." App. V p 002081 (Ex. 24).

FACTS ON THE ISSUE OF KNOWING AND VOLUNTARY WAIVER OF RIGHTS

48. Antoniewicz did not at any time, with Ms. Sanders, compare or contrast the benefits of FMLA leave to the benefits of the company's non-FMLA "personal leave" program. App. V p002206 (Antoniewicz depo p. 50, lines 16-25).

49. Ms. Sanders was "very emotional" at the March 16, 1998, meeting between herself and Ron Antoniewicz. App. V p002168 (Antoniewicz depo p12 lines 17-25).

50. Antoniewicz testified that Ms. Sanders "responded very quickly in telling me that this [FMLA] was not something that she was interested in." App. V p002178 (Antoniewicz depo p22 lines 6-23).

51. Antoniewicz testified he informed Ms. Sanders that FMLA was an option, and that she "rather quickly and firmly" said "no." App. V p002196-97 (Antoniewicz depo at p40 lines 18-25 to p41 lines 1-7).

52. Ms. Sanders expressed a "great deal of concern" about confidentiality and privacy. App. V p002169 (Antoniewicz depo p13 lines 7-19).

53. Antoniewicz does not recall why Ms. Sanders would have chosen the personal leave over FMLA leave. App. V p2199 (Antoniewicz depo p43 at lines 18-25).

TESTIMONY FROM MS. SANDERS ON THE ISSUE OF INTERFERENCE WITH FMLA RIGHTS.

54. Ms. Sanders testified unrebutted that she could have taken the thirty-day real life test while continuing her ordinary full time employment.[1] App. I p001530 (Tr. Vol 1, testimony of Ms. Sanders at page 141 lines 4-10).

55. Ms. Sanders testified that she first learned that FMLA might have applied to her surgery was after her termination when she began calling lawyers. App. I p001557 (Tr. Vol I, testimony of Ms. Sanders at p168 lines 2-8).

56. Ms. Sanders testified that Antoniewicz promised her she could return to work for the asking within 30 days of her personal leave commencing. App. I p001528 (Tr. Vol I, testimony of Ms. Sanders at p139 lines 3-8); See also Id. at p001522 lines 14-19.

57. Ms. Sanders requested by letter dated May 16, 1998 that Antoniewicz provide a written statement of the terms of her personal leave, but Antoniewicz did not do so. App. I p001530-1531 (Tr. Vol I, testimony of Ms. Sanders at p141 line 17 to p142 line 3).

58. Ms. Sanders testified that Antoniewicz did not request medical certification and did not mention FMLA to her.

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[1] Just to be clear, it was Sanders desire to do the real life test (RLT) outside of work. That was a factor in why Sanders requested leave when the prospect of a leave was brought up. Had May Company not offered Sanders a leave there were other RLT alternatives available to Sanders. For example, Sanders could have taken vacation for her RLT, Sanders could have had Dr. Bernie, her doctor responsible for her approval, shorten or waive the RLT requirement, or the RLT could have been performed outside of work. These options were not required because May Company offered Sanders a leave of absence.

App. I p001522 (Tr. Vol I, testimony of Ms. Sanders at p133 lines 20-23).

59. Ms. Sanders testified that she did not tell Antoniewicz that she was definitely resigning. App. I p001522 (Tr. Vol I, testimony of Ms. Sanders at p133 lines 10-13).

60. Ms. Sanders testified that she provided a notarized doctor's statement to Antoniewicz in June 1998 describing her surgery and recovery period. App. I p001540 (Tr. Vol I, testimony of Ms. Sanders at p151 lines 18-25).

61. Ms. Sanders testified that in March 1998 it had not crossed her mind that FMLA might apply to her surgery. App. I p001536 (Tr. Vol I, testimony of Ms. Sanders at p147 lines 6-9).

62. Ms. Sanders testified that May Company never sent her a letter requesting that she submit formal medical certification to be eligible for medical leave. App. I p001536 (Tr. Vol I, testimony of Ms. Sanders at p147 lines 2-5).

63. Ms. Sanders testified that when she left her meeting with Antoniewicz she understood he was going to try to get her a 30 day leave. App. I p001531 (Tr. Vol I, testimony of Ms. Sanders at p142 lines 11-14).

64. Ms. Sanders testified that before her personal leave commenced she called Antoniewicz and asked him for a written statement of the terms of her leave, but he did not supply such statement. App. I p001527 (Tr. Vol I, testimony of Ms. Sanders at p138 lines 16-21).

OTHER LETTERS MS. SANDERS WROTE HER EMPLOYER RELATING TO THE ISSUE OF INTERFERENCE WITH FMLA RIGHTS

May 16, 1998 Letter (trial exhibit 3, 2062, 2063)

65. Ms. Sanders requested information about her leave of absence. She writes:

> "It has been three weeks now. Recall, I asked you to provide me a memo of understanding of the terms of my leave of absence. I never did get that."

66. Ms. Sanders letter inquires at to when her leave will end. She writes:

> "First I would like to know when my official leave of absence ends. I really don't know if a 30 day leave of absence means 30 days or 30 *work* days."

(It was never clear the length of Sanders leave, reference #35-#37, facts above. Antoniewicz, Sikyta, and Sanders all testified as to a different leave duration.)

67. Ms. Sanders letter speaks of continuing employment with the May Company when she writes:

> "Finally, I want to at least "explore" the possibilities of continued employment at May Company. May Company is a big corporation, do they have some opening somewhere in the organization for a person of my talents? Perhaps I could even consider a different type of position. Anyplace in the country is ok, as I am on my own. At the very least I should inquire about this. May, is honestly, the best Company I have worked for. Of course, I realize that who you work for and where you work could make a difference. Anyway, continued employment with May would allow me to keep my 401k, pension, vacation, and insurance intact and, since I am not able to get any "severance compensation, I should consider all my options. What are the possibilities? I want to stress that I "pass" all the

time. I am quite comfortable with "me". You have seen my pictures."

68. Ms. Sanders letter provides notice (again) of the need for FMLA leave when she writes:
"I am still scheduled for my surgery June 4. It was not easy to set this surgery up. You have to be approved by two psychologists and two medical doctors. In addition, it is so expensive. That surgery will require a 10 day hospital stay, involve two days of travel and two weeks of convalescing at home. In relation to the prior paragraph, I would like to point out that if I return to May, I will be what is termed "post-op". That will mean that legally and anatomically speaking I will be female. This should eliminate all the "silly" "which bathroom" issues."

June 17, 1998 Letter (trial exhibit 7, 2067, 2068)

69. Ms. Sanders writes of continuing employment with the May Company and provides further notice of her need for FMLA leave. She writes, 2nd paragraph:
"I have decided to return to May Company from my leave of absence. If you want a specific date, lets make it Monday, June 29, however, please know there is nothing special about this date; a few days prior or after would be fine. Of course I realize you have to find a place for me and this could delay everything. Right now I am not in condition to return to work. I am recuperating from surgery at a friends house and have to do certain things medically that would preclude working. (I believe I mentioned this in our phone conversation.)"

69.5. Ms. Sanders expectation of confidentiality about her surgery is dismissed entirely. She states in this letter that Antoniewicz may tell whomever is necessary about her sex reassignment surgery:

"In order to facilitate our mutual goal of my return to work I must be realistic about my life now. There is no going back from where I am now; indeed, I do not want to. Therefore, I know longer request confidentiality about what I have done. If you feel it is necessary go ahead and tell whomever about my surgery. That said, it is preferred it be told in an "educational, tactful, and discreet, manner". In fact, feel free to show this letter if you think it appropriate."

"I have read much on the internet about other transgendered women, like myself. In cases where the person returned to work, where that person was known the "other way", a brief informative meeting of the department was held "preparing" the co-workers. The meeting was for the purpose of disclosing "the transformation", and provide a little education about "transgenderism"; something like "sensitivity training" from a different angle".

70. Ms. Sanders supplies medical documentation with this letter. She writes (2nd to last paragraph):
"For my records at May Company, I am enclosing a

copy of a certified document from my doctor in regard to my sex reassignment surgery."

June 23, 1998 Letter (trial exhibit 8, 2069)

71. Ms. Sanders reiterates her desire to return to work. She writes:

"Per our conversation today, I want it understood that I wish to return to work at the May Department Stores Co. My letter of June 17, 1998 requested a return date of June 29. I understand a position may not be available prior to or on this date."

72. Ms. Sanders lack of understanding of her leave is manifested when she writes:

"However, it was not known by me until our conversation today that I could be on a company-approved leave of absence for up to 13 weeks, representing one week for each year of employment service, nor did I know until today that I could be terminated after this leave."

73. Ms. Sanders pleads with May Company to place her in some position so as termination can be avoided.

"Termination is something I do not want, and request that it be prevented by placing me in a position commensurate with my skills and experience. It will be extremely difficult to resume my career with a company other than the May Department Stores Co. I will accept a reasonable and negotiable pay decrease in order to secure employment. I wish to maintain my other benefits, such as pension plan, 401k plan, vacation, insurance, etc."

June 28, 1998 Letter (trial exhibit 9, 2072)

74. Ms. Sanders speaks again of her desire to return to work.

"I am unsure of how "taking" this vacation" [reference her request for 3 weeks of vacation pay] "would effect my leave of absence and continued employment with May. Does this extend the "termination deadline" of the leave of absence by three weeks?"

July 10, 1998 Letter (trial exhibit 15, 2073)

75. Ms. Sanders reiterates her desire for employment. She writes:

"Although I am back in Minnesota I amstill

interested in a comparable position at May Company. One thing I have learned during this tumultuous time in my life is the need for independence. My good job at May Company will provide that."

76. Ms. Sanders suggests jobs for herself at May Company.

"As I have mentioned to you in my past correspondence, I was doing much report generation for areas outside my department, particularly for Jack Kahman and Kurt Howard. .....Perhaps he could use my talents."

August 12, 1998 Letter (trial exhibit 10)

77. This letter was written after Ms. Sanders was terminated. She testified that she started calling attorneys upon being fired and that is how she found out that FMLA was applicable to her surgery. In this letter to Jayne Sikyta she demands the benefits that should have been afforded her under FMLA. She writes:

"I stated in a letter to Ron Antoniewicz that I was physically ready and wanted to return to work June 29, 1998. Accordingly, I would expect back pay from June 29 (plus interest) and I would expect my job back or an equivalent job, at the same pay and benefit level as prior to my leave of absence. The merit/general pay increase that was awarded to active employees May 1, 1998, based on my satisfactory review in April, would be expected as well. ..... I expect my medical insurance to be covered at the same amount as was paid for by the company when I was an active employee,[2] from

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[2] Although Sanders did not realize it at the time, May Company was providing medical insurance coverage during Sanders 13-week Personal Leave.

April 24, 1998 forward. In short, I now expect all benefits that should have been afforded me while on my approved *Leave of Absence*."

LETTER FROM MAY COMPANY SUPPORTING AN UNCONDITIONAL REHIRING

January 21, 1999 Letter from May Company (trial exhibit 12)

78. May Company offered to rehire Sanders in January 1999. In May's letter of January 21, 1999 May's attorney presents May's unconditional job offer to Sander's attorney.

"This letter serves to confirm our discussion of yesterday afternoon during which The May Department Stores Company unconditionally offered Ms. Sanders employment as a Senior Purchasing Analyst in our corporate offices." (Underscore added.)

Eugene A. Schrang M.D., S.C.
Plastic and Reconstructive Surgery
125 E. Forest Ave., Neenah, Wisconsin
Tel: (920)725-6661 Fax: (920)725-1925
Email: eschrang@aol.com

Date: June 9, 1998
Regarding: Terry A. Sanders Date of Birth: 10/17/48

To Whom It May Concern:
This is to certify that the above named patient is a 49 year old male to female transsexual who underwent Male to Female Sex Reassignment Surgery on June 4, 1998. The operation was performed by me at Theda Clark Regional Medical Center in Neenah, Wisconsin.

This surgery has effectively converted Terry Sanders into a woman. Specifically I removed the testicles and penis and created a fully functional vagina, labia and clitoris. She should now be considered a functioning, anatomical female.

I performed the surgery in compliance with the Harry Benjamin Guidelines. It was done on the recommendations of two licensed workers in the gender oriented field and after the recommended one year course of hormone therapy was completed.

State of Wisconsin
County of Winnebago

Very sincerely yours,

s\ Eugene A. Schrang

Signed before me this 10th day of June, 1998

Eugene A. Schrang, M.D.
EAS:jck

s\ Jacqueline C. Kislewski

(Seal)

x My commision expires on 1/28/01